Oneida County Community Action Agency, Inc. *and* Civil Service Employees Association Local 1000, AFSCME, AFL–CIO, Petitioner. Case 3–RC–10156

June 14, 1995

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and objections in an election held by mail ballot between December 15, 1994, and January 3, 1995, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to the Regional Director's Decision and Direction of Election. The tally of ballots showed 30 for and 27 against the Petitioner, with 4 challenged ballots. The challenged ballots are sufficient in number to affect the results of the election.

The Board has reviewed the record in light of the exceptions[1] and brief and has adopted the Regional Director's findings[2] and recommendations.[3]

DIRECTION

IT IS DIRECTED that the Regional Director for Region 3 shall, within 14 days of this Decision, Direction, and Order, open and count the ballots of Tara Day, Gwen Dean, and Dawn Landry and thereafter prepare and serve on the parties a revised tally of ballots. If the revised tally shows a victory by the Petitioner by a margin of two or fewer votes, the Employer's Objection 1 shall be sustained insofar as it alleges that John Marmol and Mary Petronella were disenfranchised because the Resident Office failed to send them duplicate ballot kits. In that event, the election shall be set aside and a rerun election shall be conducted. If the revised tally shows a victory by the Petitioner of three or more votes, or if it shows a tie vote or a majority against representation, the Employer's Objection 1 shall be overruled in its entirety, and the Regional Director shall issue the appropriate certification.

ORDER

IT IS ORDERED that this proceeding is remanded to the Regional Director for Region 3 for further appropriate action.

MEMBER TRUESDALE, concurring.

I agree with my colleagues that the challenges to the mail ballots of employees Tara Day, Gwen Dean, and Dawn Landry should be overruled and their ballots opened and counted. The Board agent challenged their ballots on the ground that the ballots were not received at the Albany Resident Office by the close of business on January 3, 1995, the deadline set for return of the ballots. The Resident Office did receive their ballots the next day, January 4, however, and the Board agent had them in his possession when the count was conducted on January 5. Because the Petitioner originally refused to agree to count these ballots, they were recorded on the tally as challenged ballots. Subsequently, however, the Petitioner agreed that these three ballots should be counted.

The Board's general rule with respect to late-received mail ballots, as set forth in NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11336.4, is that

> Envelopes received after the close of business on the return date should be kept separated from those timely received. The Board agent should void these ballots as ''untimely'' at the checkoff. However, if all parties agree to waive the deadline, such ballots will be opened and counted.

Applying this rule here, the Regional Director in his report made the recommendation, which my colleagues and I have adopted, to overrule the challenges to these ballots on the ground that both the Employer and the Petitioner agreed that they should be opened and counted. The Regional Director further stated, however, that ''even absent agreement of the parties, counting these ballots would be consistent with the objective of permitting the broadest possible participation of eligible employees in Board conducted elections.'' I endorse the Regional Director on this point and agree with him that ballots received after the return date, but before the time set for the mail ballot count, should be included in the count. Indeed, for the reasons set out below, I believe that the Board's mail ballot election process would be best served if the ''return date'' requirement were abolished altogether and the Board agent simply included in the ballot count all ballots that the Regional Office received prior to the time fixed for the counting of ballots.

In *Queen City Paving Co.*, 243 NLRB 71 (1979), the Board relaxed the general rule set out in Sec.

[1] In the absence of exceptions, we adopt pro forma the Regional Director's recommendations concerning the challenged ballots and the Employer's Objection 1.

[2] As the Employer has noted, the Regional Director overstated the percentage of eligible voters whose ballots will be counted. There will be 60, not 65, ballots counted, or approximately 79 (not 85) percent of the 76 eligible employees. This apparently inadvertent error does not affect the validity of the Regional Director's ultimate findings or his recommendations.

[3] In agreeing with his colleagues that the Regional Director did not clearly abuse his discretion in ordering a mail ballot election, Member Stephens finds that the circumstances presented here are markedly different from those addressed in his dissenting opinion in *Shepard Convention Services*, 314 NLRB 689, 690 (1994), in which Member Stephens would have found that the Regional Director permissibly declined to direct a mail ballot election.

11336.4, above, and, notwithstanding that there was no waiver of the deadline, directed that a ballot mailed 3 days before the deadline be opened and counted because ''it was reasonable for [the employee] to assume that, in the normal course of the mails, his ballot would be received by the Regional Director prior to the closing date.''

In *Kerrville Bus Co.*, 257 NLRB 176 (1981), the Board further relaxed the rule by directing that, in addition to five ballots that had been mailed at a time when the employees could reasonably anticipate timely receipt, two additional ballots should be counted although timely receipt could not have been anticipated (one was mailed on a Sunday, the day before the due date, and the other on the due date). Citing several factors to be considered, the Board concluded that the ballots should be counted as a matter of fundamental statutory policy to afford employees the broadest possible participation in Board elections as long as the election procedures are not unduly interfered with or hampered.

Perhaps as a result of *Kerrville*, Sec. 11336.4 was amended to add that ''[a]s long as the election procedure is not unduly interfered with or hampered, ballots received after the established date of receipt, but before the count, may be opened and counted in certain circumstances.'' This broader rule was applied in *American Driver Service*, 300 NLRB 754 (1990).

I think it is fair to anticipate that as a result of budget restrictions and efforts underway to reinvent the NLRB as well as the Federal government generally, there may well be an increased use of mail ballots, with a concomitant increase in the number of problems reflected by the cases cited above. I believe that Board should resolve these problems now by abolishing the ''return date'' approach altogether. Under this scenario, the Board should announce that henceforth mail ballots will be counted on a date agreed on by the parties or established by the Regional Director in an appropriate case, that all ballots received before the count begins will be counted, and that ballots received after the count begins will not be counted. In effect, the Board has already adopted this policy without saying so, inasmuch as it will overrule challenges to mail ballots regardless of when they are received so long as the counting of the ballots has not begun. *American Driver Services*, above.

Pending a stated change in policy, however, I agree that the ballots in question here should be counted as they were received prior to the ballot count and the parties agreed that they should be opened and counted.